No. 90-830

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

BELL ATLANTIC CORPORATION,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## AT&T's OPPOSITION TO PETITION FOR CERTIORARI

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## STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in ACE Limited; Paradigm Technology, Inc.; Sundisk Corporation; Resound Corporation; Intermetrics Inc.; Telehouse America, Inc.; Communications Software Development, Inc. (Mitek Systems, Inc.); Compagnie Industriali Riunite S.p.A. (CIR); Sun MicroSystems, Inc.; Societa' Italiana Telecommunicazioni S.p.A. (Italtel); Canadian Distance Learning Development Centre Ltd.; Truevision, Inc.; Atesia S.p.A.; Jamaica Digiport International, Ltd.; Omnicad; Novo Quality Services Pte. Ltd. (Singapore); Western Electric Saudi Arabia, Ltd. (WESA); GoldStar Information and Communications Co. Ltd.; Airways Facilities Engineering Co.; AG Communications Systems Corporation; APT Italia S.A.; CA Charlotte Associates; Grassmere Park Associates; 155334 Canada Inc. (Canada); Tower Center Associates; ABC Travelbank Limited; AT&T Credit FSC, Inc.; AT&T Fleet Services; AT&T JENS Corporation (Japan); AT&T of Shanghai, Ltd.; Call Interactive; Cuban American Telephone and Telegraph Co. (Cuba); Facilities Management Services Limited; GoldStar Fiber Optics Co., Ltd. (Korea); PITS Holding BV; Rosewood Associates; AT&T ISTEL Purchasing Systems Limited; AT&T Network Systems Espana SA; AT&T Ricoh Company Ltd. (Japan); InView Limited; LITESPEC Inc.; LYCOM A/S (Denmark); Claimview Limited; ISTEL Holdings Limited; AT&T Taiwan Telecommunications Co., Ltd.; Failsafe ROC Limited; AT&T Network Systems International BV (Netherlands); Agricultural Commodities Services Limited; InView Holdings Limited; VIEWTEL Holdings Limited; AT&T Automotive Services, Inc.; AT&T Europe s.a./n.v. (Belgium); AT&T (UK) Ltd.; AT&T Telecomunicacoes Ltda. (Brazil); AT&T France S.A.· Eastern Telephone and Telegraph Company (Canada); and AT&T Hong Kong Limited.

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## AT&T's OPPOSITION TO PETITION FOR CERTIORARI

### REASONS FOR DENYING THE WRIT

Petitioner Bell Atlantic Corporation is seeking review of a decision that construed one provision of the 1982 antitrust consent decree that broke up the former Bell System. In this decision, the District of Columbia Circuit held that the divested Bell Companies ("RBOCs") cannot avoid the Decree's core interexchange services injunction by "bundling" or "packaging" prohibited long distance services with those telecommunications or nontelecommunications services that the RBOCs are authorized to provide.

There is no basis for Supreme Court review of this decision. It does not conflict with any decision of this Court or of any court of appeals. To the contrary, the Court of Appeals has simply applied well-established principles of decree construction to the unique facts of this case. The Court of Appeals' decision was compelled by the "four corners" of the 1982 Decree, by other contemporaneous evidence of the parties' intent, and by the uniform subsequent interpretations of both the original parties to the Decree and the District Court that administers it.

The only way Bell Atlantic can challenge this holding is by ignoring, or misstating, both these facts and the grounds for the Court of Appeals' holding.

1. The principles that govern the construction of antitrust and other consent decrees are well settled. Consent decrees are "to be construed . . . basically as a contract." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). The court is to examine the "four corners" of the decree (*United States* v. *Armour & Co.*, 402 U.S. 673, 681-83 (1971)), and "as with any other contract," the Court may rely on such "aids to construction" as the "circumstances surrounding the formation of the consent order," the mutual purposes of the parties when ascertainable, and the prior interpretations of the parties and the Court. *ITT Continental Baking*, 420 U.S. at 238; *see Restatement of Contracts 2d*, §§ 202(1), 223(1). The District Court and the District of Columbia Circuit have repeatedly applied these principles in construing the 1982 consent decree at issue here.[1]

2. Bell Atlantic argues that the Court of Appeals has nonetheless here violated the "four corners" rule of decree construction. This is nonsense. The Court of Appeals rested its construction of the Decree's interexchange services injunction on the ground that the Decree's *definition* of interexchange telecommunications includes any service in which the RBOC offers interexchange facilities for hire, whether or not the "interexchange portion" of the service is separately identified and separately charged for. App. 7a-8a; *see* Decree, Section IV(F) & IV(P) (App. 30a & 32a).

As the Court of Appeals emphasized, that definition is essential to prevent the wholesale subversion of the parties' mutual purpose—as stated in the contemporaneous Tunney Act record—of

[1] *E.g.*, *United States* v. *Western Electric Co.*, 894 F.2d 1387, 1390-95 (D.C. Cir. 1990); *id.*, 900 F.2d 283, 293-300, 305-09 (D.C. Cir. 1990); *id.*, 894 F.2d 430, 434-38 (D.C. Cir. 1990); *id.*, 846 F.2d 1422, 1427-31 (D.C. Cir. 1988); *id.*, 797 F.2d 1082, 1089-91 (D.C. Cir. 1986); *id.*, Opinion, pp. 3-4 (D.D.C. Feb. 26, 1986); *id.*, 627 F. Supp. 1090, 1093-1113 (D.D.C. 1986).

preventing "any recurrence" of disputes over whether the RBOCs had misused their bottleneck monopolies to impede competition in the long distance business.[2] By contrast, Bell Atlantic's "strained" construction would allow the RBOCs to provide "extensive" interexchange services by "simply packaging that service with some other noninterexchange telecommunications service or even nontelecommunications service." App. 7a. As commentators have demonstrated, line of business and other restrictions could be evaded at will through such "bundling."[3]

3. Thus, contrary to its own contention, Bell Atlantic is ultimately reduced to arguing that the Court of Appeals should have gone *outside* the "four corners" of the Decree and the contemporaneous Tunney Act record of its purposes. In Bell Atlantic's view, the court should have given dispositive weight to a subsequent 1983 ruling that authorized the RBOCs to provide certain interexchange transmission services in four narrow conditions—only one of which even arguably involved interexchange telecommunications for hire. *Compare* Pet. 16-18, *with Opinion*, 569 F. Supp. 1057, 1066-1071 (D.D.C. 1983).

However, as the District Court (App. 15a-19a) and the Court of Appeals stated (App. 8a-10a), this 1983 order cannot remotely be read as adopting Bell Atlantic's proposed interpretation of the interexchange services injunction, but was, at most, a "pragmatic" decision to waive this restriction in that one narrow condition. Indeed, no other reading is possible because the original parties and the District Court rejected Bell Atlantic's proposed interpretation in three other contemporaneous orders in 1983 and early

[2]*E.g.*, *United States* v. *AT&T*, 552 F. Supp. 131, 142 & 167-68 (D.D.C. 1982); *see* Competitive Impact Statement of United States, pp. 8, 38-42 (Feb. 16, 1982); AT&T's Reply, pp. 45-46 (May 21, 1982).

[3]*See* R. Posner & F. Easterbrook, *Antitrust*, p. 809 (2d ed. 1981) (attempted evasion of gasoline price controls by providing a rabbit's foot along with each sale of gasoline); *see also id.*, pp. 802-10 (discussing other such cases).

1984 (and in one 1986 order). In these four orders, as here, the court held that the interexchange injunction bars the RBOCs from providing customers with interexchange facilities for use with the RBOCs' authorized telecommunications services, whether or not an RBOC separately charges for the interexchange portions of the services.[4] *See* App. 15a-20a (discussing prior rulings).

Thus, because the Court of Appeals' holding was compelled by the subsequent interpretations of the Decree as well as by its terms and original purposes, the question of whether and when a court of appeals is bound by prior unappealed district court rulings is simply not presented. *Compare* Pet. 16-17, *with United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 21-24 (1959).

4. Finally, there is no substance to Bell Atlantic's argument that the Court of Appeals' holding will prevent the RBOCs from efficiently offering whatever "information services" they are now, or hereafter, authorized to provide. Pet. 18-20.

Information services are services in which customers place telephone calls to computers in order to retrieve, store, or manipulate information. Contrary to Bell Atlantic's claim (Pet. 19), the

[4]First, in 1983, the District Court held that the interexchange injunction bars the RBOCs from providing the long distance facilities and services used in offering authorized cellular radio mobile telephone service or one-way paging services across exchange boundaries, unless a waiver is granted. *United States* v. *Western Electric Co.*, 578 F. Supp. 643, 644-46 (D.D.C. 1983) (granting some such waivers but denying others). Second, in 1983 and again in 1984, the District Court held that, absent a waiver, the RBOCs could not provide the interexchange facilities that customers would use to call time and weather information numbers when the information service computer was located in a second exchange. *Id.*, 578 F. Supp. 658, 661 (D.D.C. 1983); *accord*, *id.*, Memorandum, p. 6 n.9 (D.D.C. Feb. 6, 1984). Third, in 1986, the District Court held that the interexchange injunction bars the RBOCs from providing interexchange services in connection with the authorized businesses of providing customer premises equipment. *Id.*, 627 F. Supp. 1090, 1100-02 (D.D.C. 1986).

Court of Appeals' holding would not prevent an RBOC from providing these services in centralized computers so long as the RBOC does not also provide interexchange facilities and services to its information services customers. To the contrary, the RBOCs may adopt this centralized architecture for their authorized information services so long as their customers obtain the long distance services required to call the central computer from AT&T, MCI, or one of the nation's several hundred other long distance carriers.

Further, the RBOCs are free to seek waivers to provide interexchange services by claiming that the otherwise prohibited offerings would be *de minimis* and incidental to other "primary businesses" and would not present the threats to competition that the Decree sought to prevent.[5] By contrast, as the Court of Appeals held (App. 7a-8a), Bell Atlantic's proposed construction would allow the RBOCs to recreate the very combinations that the Decree sought to end. This vividly underscores that the Court of Appeals' decision is a correct application of well-settled principles.

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[5]Bell Atlantic's reliance (Pet. 15-16) on *Red Ball Motor Freight, Inc.* v. *Shannon*, 377 U.S. 311 (1964), is wholly misplaced. Unlike the statute at issue there, Section II(D)(1) does not adopt a "primary businesses" test, but is a *per se* prohibition against the RBOCs' provision of any interexchange services for hire. Thus, contentions that the interexchange services are *de minimis* and incidental to other activities are irrelevant to the application of the interexchange injunction of Section II(D)(1). By contrast, these claims could be grounds for waivers under Section VII or Section VIII(C). *See* App. 36a. Indeed, waivers have been granted on such grounds in the past. *United States* v. *Western Electric Co.*, 578 F. Supp. 643, 647-52 (D.D.C. 1983) (cellular waivers); *id.*, 578 F. Supp. 658, 661 (D.D.C. 1983) (time and weather waivers).

## CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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